

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

FIRST ACT INC.

Plaintiff

v.

KIDZ TOYZ, INC. and
CHRISTMAS TREE SHOPS, INC.

Defendants

Civil Action No. 03-12507 EFH

**DECLARATION OF MARK S. IZEN
IN SUPPORT OF FIRST ACT'S MOTION FOR PRELIMINARY INJUNCTION**

I, Mark S. Izen, declare as follows, based on my personal knowledge:

1. I am president and chief executive officer of First Act Inc., located in Newton, MA. First Act designs and makes musical instruments for children and young adults, ranging from simple percussion instruments to band instruments. We also offer hand-crafted electric guitars for professional musicians. The company, which I founded in 1995, concentrates its sales in the large retailer and toy store market.

2. First Act is the first company, to my knowledge, to mass-market real musical instruments sized for children. We devote extensive resources to designing eye-catching packaging for these instruments.

3. First Act designs and sells the FirstAct DiscoveryTM line of affordable musical instruments geared for children ages 4-10. We market these instruments through mass

merchandisers (like Wal-Mart), discount retailers (*e.g.*, K-Mart, Toys R Us, Target) and wholesale clubs, (*e.g.*, Sam's Club, BJ's, Costco).

4. One of the items we sell in this line is the "Junior Quartet," a boxed set of four instruments meant for children: a tambourine, a triangle, and two jingle sticks. The choice of instruments is arbitrary; we could have added or substituted a kazoo, harmonica, or other kid-friendly instrument. Likewise, the choice of wood for the jingle sticks is arbitrary, as such sticks are also made of plastic or other materials.

5. The Junior Quartet has always been sold in a distinctive package that resembles a stage, a play on our company name. The invariable configuration has the tambourine sitting on a small stage in the center, flanked by the jingle sticks, with the triangle positioned in front of and partly below the tambourine. The triangle is bisected by its metal striker. Atop the stage, a panel is inscribed "First Act Junior Quartet." At the bottom, a panel reads "Junior Tambourine • Junior Triangle • Jingle Sticks".

6. The jingle sticks, like the packaging, are distinctively designed. Each has a rounded and tapered handle incised with three grooves and imprinted with the "First Act" name. The upper portion of the stick is of greater and uniform circumference than the handle and is incised with six grooves. This upper portion features four columns of three bells each, and a single bell on top. A ribbon criss-crosses the upper portion two times. The idea of using a ribbon as a design element for jingle sticks is original with First Act.

7. Because the packaging of Junior Quartet is designed to keep the instruments visible, the distinctively embellished jingle sticks and the arbitrary arrangement of the instruments are essential contributors to the overall commercial appeal of the product.

8. The Junior Quartet makes its impression on the consumer from the front of the package, not the back. Indeed, the packaging is designed to enable stacking in a sales area such that the consumer's attention is drawn to the distinctive stage-like presentation of the instruments. I know of no other musical instruments for kids sold in anything resembling our stage-like packaging.

9. First Act has made heavy monetary investment in the design and development of the packaging for Junior Quartet. We employed graphic design experts, product development personnel and a package design firm in order to create distinctive packaging for Junior Quartet. We have invested much effort and money promoting Junior Quartet and have advertised it, with depictions of its distinctive appearance, in newspapers and flyers.

10. My company began selling the Junior Quartet in late 2000, and has sold many tens of thousands of units in the last three years. This musical set has always been sold in the same packaging configuration. Due to our extensive promotion of the product, its distinctive design, and its commercial success in popular stores (*e.g.*, Toys R Us), I believe that consumers recognize the packaging and associate it with First Act. Junior Quartet is one of our best-selling products.

11. Only last month, I learned that the Christmas Tree Shops ran a newspaper advertisement for a "4 pc. music play set." One of our employees went to the Christmas Tree store on Route 9 in Natick and bought the advertised item for \$9.99, several dollars less than the suggested retail price for the Junior Quartet. It is called "Center Stage" and is manufactured by Kidz Toyz. Consumers are likely to buy either musical set on impulse without careful inspection.

12. The Kidz Toyz play set is a blatant knock-off of our Junior Quartet, right down to the packaging, the choice *and* arrangement of instruments, and the material and design of the

jingle sticks. As with our product, the package resembles a stage, and the instruments are presented exactly like ours: The tambourine sits on a small stage in the center, flanked by jingle sticks made of wood, with the triangle positioned in front of and partly below the tambourine. The triangle is bisected by the metal striker. The panel below the stage even identifies the instruments in the same order as the bottom panel of ours: “▪ Tambourine ▪ Triangle ▪ Jingle Sticks”.

13. The product name, Center Stage, not only appropriates the theatrical image of First Act’s name, but appears on the hang-tab of the package exactly where “First Act” appears on ours. The predominantly purple packaging lifts one of the two distinctive colors of First Act’s packaging. The yellow accents copy the other.

14. In addition, the Kidz Toyz jingle sticks are modeled precisely after First Act’s. Each has a rounded and tapered handle incised with three grooves and imprinted with the product name. The upper portion of the stick is of greater and uniform circumference than the handle and is incised with six grooves. This upper portion features four columns of three bells each, and a single bell on top. A ribbon criss-crosses the upper portion two times.

15. It is galling that the Christmas Tree Shops began carrying the Kidz Toyz knock-off just months after our representative solicited the Christmas Tree Shops’ interest in carrying our musical play set and left a sample of the set with them.

16. Obviously, innumerable ways exist of packaging musical instruments that look nothing like the packaging we developed for Junior Quartet. Likewise, jingle sticks can be designed that that look nothing like ours. Indeed, there are many on the market with a look all their own. For example, there are jingle sticks made of different materials, e.g., plastic; with the

bells or other jingly objects attached differently; and with distinguishing characteristics other than the grooves and criss-crossing ribbons that we use.

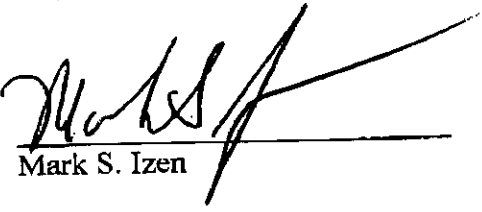
17. Until Kidz Toyz and Christmas Tree Shops introduced Center Stage last month, I knew neither of any musical set with the same overall combination and arrangement of specific features that make up the total image of our Junior Quartet nor of jingle sticks with the unusual design elements found in those included in that set.

18. I believe that the Kidz Toyz product will cut into sales of First Act's product for at least two reasons: First, consumers seeking our product will believe that the very similar-looking Kidz Toyz product *is* ours. Second, since Kidz Toyz simply copied the package design in which FirstAct had invested heavily, Kidz Toyz is able to sell its product more cheaply than we are.

19. If the marketing of Center Stage is allowed to continue, the retailers who buy Junior Quartet from us may demand lower unit prices from First Act to match those that Kidz Toyz can accept for its knock-off product.

20. First Act sent letters to both defendants last month asking that they cease their unfair competition with us in making and selling their infringing product. Kidz Toyz refused to give assurances that it would cease unfairly competing. Christmas Tree made no response at all.

Signed under the penalty of perjury this 12 day of December, 2003.


Mark S. Izen

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